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No. 98-54

In The

Supreme Court of the United States

October Term, 1998

THOMAS DODD and DORIS DODD,

Petitioners,

v.

HOOD RIVER COUNTY, an Oregon municipal corporation, and the STATE OF OREGON, intervenor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF HANS HOECK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF HANS HOECK IN SUPPORT OF PETITIONERS, TOM AND DORIS DODD

Hans Hoeck hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner has been obtained. The consent of the attorneys for respondents Hood River County and the State of Oregon was requested but was not granted.

The interest of Hans Hoeck in this case arises from the fact Mr. Hoeck has a legal dispute in which the same issue in the instant case is determinative of his ability to

pursue litigation in federal court. That issue, specifically, is whether denial of a state constitutional takings claim precludes litigating a federal constitutional takings claim in federal court.

Mr. Hoeck is a realtor and real estate developer in the City of Portland, Oregon. Until 1991, he was the owner and renovator of the Bridgeport Hotel in Portland. After the City of Portland demolished the hotel as a "dangerous building," he brought a pendant action against the City in the U.S. District Court, contending, *inter alia*, the city's demolition of his building violated the Takings Clause of Article I, section 18 of the Oregon Constitution by arbitrarily and unreasonably demolishing his building, taking his private property without just compensation. Disregarding Mr. Hoeck's argument, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. Thereafter, this Court denied his Petition for a Writ of Certiorari in No. 95-748.

Even though Mr. Hoeck has exhausted his remedies under the Oregon Constitution, the issue preclusion decision of the Ninth Circuit in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) has prevented him from seeking relief under the Fifth and Fourteenth Amendments in federal court. Thus, the Court's review of this decision is essential to resolving not only "the chaotic jumble of methodologies regarding how to apply the 'economically viable use' test," Pet., p.27, but also the question of whether "the district court correctly applied issue preclusion against the Dodds." Pet. App. A, p. A-19.

Respectfully submitted,

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July 31, 1998

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INTEREST OF THE *AMICUS CURIAE*

The interests of *amicus* are set forth in the preceding motion for leave to file brief *amicus curiae* of Hans Hoeck.[1]

ARGUMENT

In the interests of judicial economy, *amicus* Hans Hoeck adopts by reference the statement of the case as presented in the brief filed by Petitioners Tom and Doris Dodd. Nevertheless, *amicus* will briefly present those aspects of the case that are pertinent to the arguments presented in this brief.

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[1] Counsel for Hans Hoeck authored this brief in whole and only Mr. Hoeck made a financial contribution to its preparation and submission.

INTRODUCTION AND STATEMENT OF THE CASE

After Hood River County had denied the Dodds' permit for a dwelling on their 40-acre parcel, the Oregon Land Use Board of Appeals (LUBA) affirmed that denial, rejecting the Dodds' claims the county's decision constituted a taking under the Oregon constitution. On appeal, LUBA's decision was upheld by the Oregon Supreme Court in *Dodd v. Hood River County*, 317 Or. 172, 855 P. 2d 608 (1993). At every step of this process, the Dodds reserved their federal claims for litigation in federal court by asserting a reservation of those claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The Dodds then filed a federal constitutional takings claim in the U.S. District Court for the District of Oregon. Although the district court dismissed their case due to ripeness, the Ninth Circuit reversed that decision and remanded the matter back to the district court to first address the issue of whether issue preclusion effect should be given to the decision of the Oregon Supreme Court. Pet. App. D, p. D-19 (hereinafter *Dodd I*).[1] The district court on remand then concluded that the decision of LUBA, which had been affirmed by the Oregon Supreme Court, precluded litigation of the Dodds' federal takings claim in federal court. Pet. App. B., p. B-16.

On appeal to the Ninth Circuit, that court , after considering and ruling on various takings factors the

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[1] *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

District Court did not discuss, finally concluded "The district court correctly applied issue preclusion against the Dodds . . .." Pet. App. A, p. A-19 (hereinafter *Dodd* II).[2]

The Ninth Circuit concluded that issue preclusion applied against the Dodds because they fully litigated before LUBA the question of whether they had been denied all substantial beneficial use of their property. Pet. App. A., p. A-7. The court agreed with the Oregon Supreme Court that the Dodds' investment-backed expectations were not reasonable, Pet. App. A, pp. A-17 - A-18, and thus they had not been deprived of all economically viable use of their property. Therefore, the Dodds had fully litigated in the state courts, and under the state constitution, a "necessary issue that is identical to an issue before the federal court," Pet. App. A, pp. A-12, even though that issue in federal court was brought solely under the federal Constitution.

This case squarely presents the question of whether property owners seeking just compensation in federal court under the Takings Clause of the Fifth Amendment, after having been forced by reason of ripeness to litigate state takings claims in state court, may be denied a federal forum for their federal takings claims due to issue preclusion.

Since this Court decided *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985), this question has arisen in several federal circuit courts of appeal across the nation. The decision effectively forces litigation of federal takings claims, in tandem with state takings

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[2] *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998).

claims, in state court.[3]

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT - WHERE A TAKINGS CLAIMANT FIRST LITIGATES A STATE LAW CLAIM TO COMPLY WITH THIS COURT'S DECISION IN *HAMILTON BANK*, MAY A SUBSEQUENT FEDERAL CLAIM IN FEDERAL COURT BE BARRED BY ISSUE PRECLUSION?

The precedent established by the decision below places litigants of takings claims at the sole mercy of state courts to decide the merits of federal takings issues, effectively denying such litigants a federal forum for federal constitutional issues. In no other area of constitutional jurisprudence are civil rights litigants compelled to bring their federal constitutional claims solely in state court. To construe ligation of state takings claims in state court, in

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[3] Arguably, both and federal and state takings claims also could be brought in tandem in federal court, with the state claim being pendant to the federal action. This methodology has been articulated by Mr. Kassouni, who notes that the Ninth Circuit suggested this procedure in both *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990) and *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989). Kassouni, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 29 Cal. W. L. Rev. 1, 44 n.266 (1992). Although this procedure could avoid application of the doctrine of res judicata, the federal claim still could be subject to issue preclusion, since the state claim must be addressed first to comply with ripeness.

compliance with the ripeness mandates of *Hamilton Bank*, as barring federal takings claims from federal court under issue preclusion[4] is to relegate such property rights claims "to the status of a poor relation" vis-a-vis the other rights guaranteed in the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The doctrine of ripeness of takings claims finds its origins in the command of the Fifth Amendment that "private property [shall not] be taken for public use without just compensation." This Court has held that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State . . .." *Hamilton Bank*, 473 U.S. at 195. Thus, "the State action . . . is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.* (footnote omitted).

The Ninth Circuit based its holding of issue preclusion on this Court's decisions in *Allen v. McCurry*, 449 U.S. 90 (1980) (federal courts follow traditional doctrines of res judicata and collateral estoppel) and *Parsons Steel v. First Ala. Bank*, 474 U.S. 518, 525 (1996) (Full Faith and Credit Act requires federal courts to give state court judgments the same preclusive effect as they

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[4] Mr. Kassouni defines this term: "Collateral estoppel means 'issue preclusion.' It bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." *See* Charles A. Wright, et al., *Federal Practice and Procedures* § 4402 (1981). Kassouni, 29 Cal. W. L. Rev. at 43 n.259.

would be given by that state court). Pet. App. A, p. A-6. Neither decision involved the Takings Clause of the Fifth Amendment.

The construction of these cases by the Ninth Circuit directly conflicts with this Court's decision in *England*, 375 U.S. at 421, where it was held that there is no requirement "that federal claims be actually litigated in the state courts." In light of the mandate of *Hamilton Bank* that takings claimants must first go to state court and litigate state compensation remedies there, it is the epitome of unfairness to construe *Parsons* and *Allen* in such a way as to prevent litigants from turning to federal court to fulfill the promise of *Hamilton Bank*, that they may there litigate their ripe federal takings claim. The decision of the court of appeals establishes a pernicious precedent.

A. The *Dodd II* decision holds that, even if state courts assent to an *England* reservation of a federal takings claim, issue preclusion precludes its litigation in federal court.

Mr. and Mrs. Dodd had expressly reserved their federal takings claims at every step of their state court litigation brought under the Oregon Constitution, asserting a reservation under *England*. Pet. App. D, pp. D-17 - D-18. When the Dodds first appealed to the Ninth Circuit in 1995 in *Dodd I*, both the county and State of Oregon argued that the Dodds must have asserted both their state and federal claims in state court in order for the federal claim to be ripe in the U.S. District Court. Circuit Judge Aldisert, sitting by designation, and writing for the majority, disagreed: "[T]o hold that a taking plaintiff must first present a Fifth

Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant." Pet. App. D, p. D-14. An important element of the court's decision was its recognition that "the Oregon courts sufficiently reserved this [federal] issue by repeatedly acknowledging that the Dodds' federal constitutional claims were not before them and were pending in the federal district court." Pet. App. D, pp. D-17 - D-18 (citation omitted).

Nonetheless, he went on to hold that litigation of the state claim in state court could have the effect of issue preclusion on subsequent Fifth Amendment litigation in federal court:

> An important question that is yet to be decided by any court is whether the decision of the Oregon Supreme Court in *Dodd et al. v. Hood River County et al.*, 317 Or. 172, 855 P.2d 608 (1993) on the taking questions presented by the Dodds under Article I, Section 18 of the Oregon Constitution was an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion.

Pet. App. D, p. D-19.

In the end, he remanded the case back to the District Court to consider "in the first instance the merits of the issue preclusion contention . . .." Pet. App. D, p. D-21.

U.S. District Judge Robert E. Jones, on remand, concluded that the Dodds had a full and fair opportunity to

litigate the value of their property before LUBA, and that LUBA proceeding is "entitled to have [issue] preclusive effect under Oregon law." Pet. App. B, p. B-16. Thus, he concluded "The Dodds Have Not Suffered a Regulatory Taking as a Matter of Law." *Id.*

Judge Aldisert, writing again for the panel of the Ninth Circuit, agreed: "[I]t was fair and efficient for the district court to decide the Dodds are precluded from litigating the issue: *Id.* at p. B-12 (citation omitted). He went on to state that the Dodds' reservation of their federal claim at LUBA in the state courts under *England* did not "prevent operation of the issue preclusion doctrine." *Id.*

B. The decision below, forcing Fifth Amendment takings claims into state court through issue preclusion, raises an important federal question that should be settled by this Court.

The Ninth Circuit's substantive holdings regarding the "deprivation of all economically viable use" test, and "reasonable investment backed expectations" raise critical questions under the Takings Clause of the Fifth Amendment. However, those holdings should not obscure the central question of issue preclusion in light of this Court's decision in *Hamilton Bank*.

The decision of the Ninth Circuit takes this Court's decision in *Hamilton Bank* and distorts it beyond all limits of fairness and justice. The decisions effectively construe the "just compensation" words of the Fifth Amendment to close the federal courthouse door to all federal taking claims against state and local governments. Mr. Kassouni, writing

in 1992, foresaw this likelihood:

> The United States Supreme Court might have known that its "exhaustion of state remedies" requirement would effectively close the federal courthouse doors to aggrieved property owners. While the Supreme Court has not yet overruled *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, [166 U.S. 226 (1897)] which made the Just Compensation Clause applicable to the states through the Fourteenth Amendment, the res judicata [or issue preclusion] effect of final state court judgments could do just that.

Kassouni, 29 Cal. W. L. Rev. at 43-44 (footnote omitted).

Mr. Hoeck respectfully urges this Court to grant the Dodds' Petition to address this vital question of Fifth Amendment jurisprudence and to make clear that its *Hamilton Bank* ripeness decision, and its *England* decision, require litigation of only state constitutional claims in state court, and state denial of those claims neither bars nor precludes, under *Parsons Steel* and *Allen,* subsequent Fifth Amendment takings claims in federal court.

II.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE FEDERAL COURTS REGARDING THE PRECLUSIVE EFFECT OF PRIOR STATE COURT ADJUDICATION OF STATE LAW TAKINGS CLAIMS IN STATE COURT

This case squarely presents the conflict and tension between the Full Faith and Credit Act, 28 U.S.C. § 1738, and the ripeness command of *Hamilton Bank* for asserting claims under Takings Clause of the Fifth Amendment. This Court has long established that issue preclusion applies against a Section 1983 claimant (42 U.S. C. § 1983). *Allen* , 449 U.S. at 103-104. Moreover, this Court also has long established that claim preclusion applies against a Section 1983 claimant. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984) (petitioner's state court judgment has same claim preclusive effect in federal court it would have in state court). *Parsons Steel*, 474 U.S. at 525. However, this Court has yet to address the matters of claim and issue preclusion as those doctrines apply to whether or how either claim or issue preclusion applies to the Takings Clause of the Fifth Amendment, in light of the ripeness command articulated by this Court in *Hamilton Bank*.

Federal circuit courts of appeal across the nation have construed the preclusive effect of state court litigation of state takings claims in two major ways. Three circuits have made decisions that recognize that neither claim nor issue preclusion consequences should follow if an *England* reservation of federal claims is asserted in state court. Only the Ninth Circuit clearly holds issue preclusion applies, based on this Court's decision in *Allen*, and disregarding *England*.

In 1992, the Court of Appeals for the Eleventh Circuit directly addressed "whether . . . Florida collateral estoppel and res judicata principles precluded the homeowners' federal law takings claim." *Fields v.*

Sarasota Manatee Airport Authority, 953 F.2d 1299, 1302 (11th Cir. 1992). Senior Circuit Judge Johnson, writing for a unanimous panel, concluded those principles did not. His analysis focussed on the "jurisdictional problem" posed by the seeming conflict between the Full Faith and Credit Act and this Court's decision in *Hamilton Bank*: "[T]he Williamson County Court failed to address the question whether the exhaustion of potential state remedies would also require plaintiffs with takings clause claims to litigate their federal takings clause claims in state court." *Id.* at 1303.

After recognizing that an *England* reservation "strictly speaking, is not applicable to a takings clause claim because a litigant cannot first file in federal district court," *Id.* at 1305, and distinguishing both *Allen* and *Migra*, he concluded the Eleventh Circuit had construed *England* broadly, and held:

> [W]ould-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are "involuntarily" in the state courts, and therefore qualify for the exception to generally applicable res judicata principles.

Id. at 1306.

Thus, where litigants are in state court involuntarily because of the ripeness mandate of *Hamilton Bank,* and make a type of *England* reservation of their federal takings claims, but their state takings claims are decided against them, they

may pursue their federal claims in federal court. Judge Johnson noted that "Despite the Supreme Court's recent emphasis on strictly enforcing section 1738's mandate to give state court proceedings full preclusive effect, the Court has never called into question the continuing validity of *England*." *Id.* at 1307 n.8 (citing *Migra*, 465 U.S. at 85 n.7).

Since the court at the outset was examining the applicability of "Florida collateral estoppel and res judicata principles," *Id.* at 1302, the court's conclusion about an England reservation necessarily must apply to both claim and issue preclusion.

In a 1976 decision, the Fifth Circuit squarely addressed the res judicata and collateral estoppel effects on a federal court proceeding of a prior state court action. *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976) (per curiam). Ms. Jennings had appealed her dismissal as a teacher to the school board, arguing that her dismissal was racially motivated. After her claim was rejected and she was dismissed, she appealed the board's decision in the Louisiana state courts. *Id.* at 1331. The state courts rejected her claims. Thereafter, Ms. Jennings brought an action in federal court under 42 U.S.C. § 1983, claiming deprivation of due process and racial bias. The district court dismissed her due process claim because of res judicata, and her racial bias claim because of collateral estoppel. The Fifth Circuit affirmed. *Id.* at 1332.

Although Ms Jennings argued she was forced to bring her constitutional claims in state court to comply with Louisiana statutes, the Fifth Circuit concluded she had

failed to preserve her federal constitutional claims in state court:

> Under *England v. Louisiana State Bd. of Medical Examiners*, 1964, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440, however, had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts.

531 F.2d at 1332 (citations omitted).

Since she had not done so, the court affirmed the dismissal of her case. Nonetheless, the Fifth Circuit appears to recognize that an *England* reservation of federal claims would preclude application of both claim and issue preclusion.

The Court of Appeals for the Tenth Circuit recently made a decision analogous to *Jennings* in *Wilkinson v. Pitkin County Bd. of County Com'rs.*, 142 F.3d 1319 (10th Cir. 1998) . In a case with multiple state and federal court proceedings, the plaintiff had raised, and then dismissed, a federal constitutional takings claim in state court. He did, however, argue under the Colorado Constitution that the county's rejection of his land development applications was an unconstitutional taking. The state district court dismissed that claim. *Id.* at 1321.

When the plaintiff turned to the federal district court, that court concluded that all of the claims raised there "were identical to claims made in the prior state court

litigation, and were barred by the doctrines of res judicata and collateral estopppel." *Id.* On appeal, the 10th Circuit agreed, rejecting the argument that *Hamilton Bank* prevented those doctrines from applying. Observing that no *England* type of reservation of claims had been made in state court, the court distinguished *Fields*, *Jennings* and the Ninth Circuit's decision in *Dodd I*:[5] "We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case." Id. at 1324. Thus, assertion of an *England* reservation would prevent application of both claim and issue preclusion.

Even with assertion of an *England* reservation in state court, the Ninth Circuit now has held in the two Dodd decisions, first that claim preclusion does not apply, and second that issue preclusion does apply. It concluded that claim preclusion did not apply, because the Oregon courts had reserved the federal takings issue rather than because an *England* reservation had been asserted. Pet. App. D, pp. D- 17 - D-18. Thereafter, it concluded that issue preclusion did apply, because the Dodds "fully litigated a necessary issue in the course of the state proceedings that is identical

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[5] The *Wilkinson* court also made an examination of issue and claim preclusion decisions of other federal circuit courts of appeal: *Palomar Mobilehome Park v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993) (requirement that takings claim be brought in state court before case will be ripe for adjudication did not prevent doctrine of res judicata from barring subsequent federal action); *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997) (failure of applicants to raise federal takings claim in state court will not prevent, by res judicata, subsequent litigation of federal takings claim in federal court) (citing *Dodd I*); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989).

to an issue before the federal court . . .." Pet. App. A, p. A-12 (citing *Allen*, 449 U.S. at 104 and *Clements v. Airport Auth.*, 69 F.3d 321, 330 (9th Cir. 1995) (issue preclusion does not apply unless issues were actually litigated and necessarily decided)).

These cases show a of opinion between the Fifth, Tenth and Eleventh circuit courts of appeal and the Ninth Circuit. All four circuits agree state court litigation of state compensation claims will not have claim preclusive effect on subsequent litigation of ripe federal takings claims in federal court, if an *England* type of reservation of federal claims is taken in state court. In the Fifth, Tenth and Eleventh circuits, it appears issue preclusion does not operate if an *England* reservation is taken in state court. Only the Ninth Circuit has concluded that issue preclusion may not be avoided, even if an *England* reservation was asserted. The conflict presented by these cases on this significant issue should be resolved by this Court.

CONCLUSION

In *Fields*, the court made an important finding - that takings claim litigants are in state court *involuntarily* by operation of the ripeness mandate of *Hamilton Bank*. *Fields*, 953 F.2d at 1304. They must litigate their state claims in state court before turning to the federal courts with federal claims. The *Fields* court also concluded that an *England* reservation could not appropriately be taken in a case that originates in state court - its procedures are based on commencement of litigation in federal court, where the

federal court stays the action to allow state issues to be decided in state court. *Id.*

This Court decided *England* in 1964, 25 years before it decided *Hamilton Bank*. *Hamilton Bank* envisions no such claim reservation. It is not the operation of *England* that commands takings claimants first into state court to ripen federal takings claims - it is the construction of the Fifth Amendment that compels state litigation, because "no constitutional violation occurs until just compensation has been denied [by the state]." *Hamilton Bank*, 473 U.S. at 194 n.13. In view of *England's* inapplicability to actions commencing in state court, as recognized by both the Eleventh Circuit and the Ninth Circuit, reliance on an *England* reservation seems inappropriate.

The Fields court notes that "the homeowners did not raise their Fourteenth and Fifth Amendment claims in their state court complaint. Neither the Florida trial court nor the Florida appellate court relied on federal takings cases to decide what the homeowners had to establish in order to show they were entitled to compensation for the taking." *Fields*, 953 F.2d at 1307 n.9. Those facts alone should be sufficient to preserve a federal claim for litigation in federal court. Thus, assertion of an *England* type of reservation should not be required to preserve the federal claim.

Mr. Hoeck respectfully urges this Court to grant the Petition and hold that litigating state takings claims in state court pursuant to *Hamilton Bank* preserves federal takings claims for subsequent litigation in federal court. Neither claim preclusion nor issue preclusion arises by virtue of that

state takings litigation, even if the state and federal constitutions have analogous wording, provided that no federal claims are raised in state court, and the state court decision does not base its decision on federal takings jurisprudence. This Court should grant the Petition to construe and extend the holding of *Hamilton Bank* accordingly.

Respectfully submitted:

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